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In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 633

MICHAEL PECORARO AND SAM GROSS, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Circuit Court of Appeals (R. 643–645) is reported at 115 F. (2d) 245.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered November 22, 1940 (R. 648–649), after denial of a petition for rehearing on November 19, 1940 (R. 647–648). The petition for a writ of certiorari was filed December 16, 1940. The jurisdiction of this Court is invoked under Section 240 (a)

of the Judicial Code, as amended by the Act of February 13, 1925. See also Rule XI of the Criminal Appeals Rules, promulgated by this Court May 7, 1934.

QUESTION PRESENTED

Whether there was sufficient evidence to support the verdict of the jury finding petitioners guilty of conspiracy to violate the Internal Revenue Laws relating to liquor.

STATUTE INVOLVED

Section 37 of the Criminal Code (U. S. C., Title 18, Sec. 88), so far as pertinent, provides:

> If two or more persons conspire * * * to commit any offense against the United States, * * * and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than $10,000, or imprisoned not more than two years, or both.

STATEMENT

An indictment in one count was returned against forty-two defendants, including the petitioners, in the District Court for the Eastern District of New York. This indictment charged the defendants with conspiring to possess and control certain stills set up at points on Long Island, including one at the Herth farm at Bellport, Long Island, and with further conspiring to make and ferment mash and distill alcoholic spirits, and to commit other of-

fenses connected with the illicit manufacture of alcohol, in violation of the Internal Revenue Laws relating to liquor (R. 17–32). Motions to dismiss upon the ground of insufficient evidence were made and denied at the close of the entire case (R. 591–592). Of the defendants, the indictment was severed as to nine, twenty-six pleaded guilty either before or during the trial, and seven, including the petitioners, were found guilty by verdict of the jury (R. 2, 8–13, 616–617). Petitioner Pecoraro was sentenced to imprisonment for sixteen months and petitioner Gross to imprisonment for eighteen months (R. 13, 620). The petitioners and another defendant appealed to the Circuit Court of Appeals for the Second Circuit, which affirmed the judgments of conviction as to both petitioners (R. 643–645, 648–649) and denied their petition for rehearing (R. 648).

The petitioners do not question that there was sufficient evidence to establish the existence of the conspiracy charged. Each asserts, however, that the proof failed to show that he participated in this conspiracy.

Most of the evidence relates to a period beginning in the latter part of May or the early part of June, 1938, when some of the conspirators set up a still in a bungalow on the Herth farm at Bellport, Long Island (R. 39–45), and ending on November 10, 1938, when the still was seized by Federal authorities (R. 51–52, 208–209).

1. The evidence as to petitioner Pecoraro may be summarized as follows:

Otto Herth,[1] who lived on and operated the Herth farm (R. 37–38), testified that one Mimi Franzone,[2] who worked at the still for a period of about sixteen days, informed him that he (Franzone) was working for the interest of Pecoraro (R. 97), to whom the still operators were indebted for sugar (R. 80, 97). Herth overheard a conversation between Franzone and Pecoraro in which Pecoraro stated that they owed him money; that he could not get it by law but that he would get it out of them. Pecoraro then went to the bungalow where he had an argument with Leo Rossello[3] and Little Joe.[4] After this argument he returned and told Franzone or Herth that it was all right; that he was going to get the alcohol. Two loads of alcohol were taken away that same night by Franzone and Pecoraro (R. 98). During the sixteen-day period that Franzone worked at the still truck loads of sugar were constantly arriving and Pecoraro carted away all the alcohol made during that

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[1] Herth was named in the indictment as a conspirator but was not indicted as a defendant (R. 19).

[2] Franzone was one of the defendants as to whom the indictment was severed (R. 8).

[3] Rossello was one of the defendants who pleaded guilty (R. 9, 470).

[4] Little Joe, indicted as Joseph Carlisi, alias Joseph Marks (R. 17) also pleaded guilty (R. 9, 616). The evidence establishes that he was one of the principal conspirators (R. 75–77, 100, 465–469).

period (R. 97–99, 108, 126–127). At one time Pecoraro was introduced to Herth by Big Joe [5] as the new boss (R. 110). Pecoraro told Herth that he had a place in New Jersey from which alcohol was carted away every day; that he generally did not go or drive to such places and sometimes did not even know where the places were located (R. 99–100).

Mrs. Otto Herth testified that Pecoraro was introduced to her by Franzone as Franzone's brother-in-law (R. 188). Franzone told her that Little Joe owed Pecoraro for sugar and that Pecoraro wanted to get alcohol for the sugar. When Mrs. Herth asked Pecoraro where his car was, he told her that he never brought his car to the still premises; that he left it out on the street (R. 189). The next time Pecoraro came to the Herth premises he parked his car in front of the house and he and Mrs. Herth had a further conversation about his securing money or alcohol for the sugar. Pecoraro then carted away some alcohol (R. 189–190, 195–197).

2. The evidence as to petitioner Gross may be summarized as follows:

Otto Herth testified that in October 1938 there were delivered to the still premises on his farm eighteen drums of alcohol. By means of a pump

[5] Big Joe, indicted as Joseph Rodono, alias Joseph Spano (R. 18), pleaded guilty (R. 379). The evidence establishes that he was one of the principal conspirators (R. 107–108, 191, 379–395).

and hose the contents of these drums were pumped into vats at the bungalow containing the still (R. 108). These drums, after being emptied, were still on the premises when the place was raided by the authorities (R. 110) on November 10, 1938 (R. 51). At the time of the raid there were eighteen [6] drums found in the shed next to the still bungalow. These were labeled "denatured alcohol" and "Commercial Solvents." Each drum bore a different serial number (R. 209). These same serial numbered drums, among others, totalling seventy-two drums, each containing fifty-four gallons of alcohol, were shipped by the Commercial Solvent Corporation to Penn-Vis Oil Company in Brooklyn, New York, on October 1, 1938 (Govt. Ex. 16, R. 207–210).[7] Petitioner Gross operated under the name of Penn-Vis Oil Company (Govt. Ex. 39, R. 326–327).

On October 22, 1938, Gross reported to the New York City Police Department that a truck had been stolen from his garage. Gross informed the City detective that the truck, when stolen, contained cans of Penn-Vis motor oil. He did not mention the theft of any drums of alcohol. The detective told Gross that "this is an inside job." On the same day on which the theft was reported

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[6] One witness (R. 209) stated that there were seventeen drums but gave the serial numbers of eighteen drums.

[7] This and other Government exhibits hereinafter referred to are on file with the Clerk of this Court.

the truck was found empty on a city street (R. 283–286).

Joseph Rodono, one of the defendants who pleaded guilty,[8] having heard that Gross had some alcohol drums on the Herth farm, went to Gross two or three days after the raid and told him that the still had been seized and that if Gross wanted his drums back, he would have to go out and get them himself (R. 390, 394–395). Rodono and Gross then went to see one Oscar Musso[9] at Patchogue, Long Island. Either Rodono or Gross asked Musso if he could manage to get these drums away from the Herth farm and Musso said it was impossible because of the seizure (R. 213, 380, 394–395).[10]

Several days later, on November 16, 1938, Gross called the Alcohol Tax Unit in Brooklyn and talked to Investigator Rice. On the following day Rice received from Gross, by messenger, an affidavit, verified by Gross, in the form of a letter to the Alcohol Tax Bureau written on a Penn-Vis Company letterhead (Govt. Ex. 39, R. 325–327), the body of which read as follows:

> On October 21st, 1938, a burglary was committed on our premises consisting of our truck with diverse merchandise, included in

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[8] See footnote 5, *supra*, page 5.

[9] Musso, *alias* Tony Rocca (R. 18), pleaded guilty (R. 479).

[10] While Musso testified that he could not identify the man who came with Rodono as Gross, he admitted that some man came to see him with Rodono (R. 482).

which was some drums containing Ajax-Anti-freeze serial nos., which are as follows:

[Listing 18 serial numbers]

This burglary was reported to the detective bureau on the following morning.

This letter was signed "Sam Gross, Penn-Vis Oil Co."

The eighteen serial numbers listed in the letter are included among the serial numbers of the drums shipped by the Commercial Solvent Corporation to Gross on October 1, 1938 (Govt. Ex. 16, R. 207–210). Seventeen of the numbers referred to in the letter are identical with those found on seventeen of the drums seized on the Herth farm (R. 209). Four of the drums, the serial numbers of which appear both in Gross' letter and on the list of serial numbers representing the drums found at the Herth farm, were reported by Gross to the Alcohol Tax Unit as having been sold by him to a service station in Brooklyn (Govt. Ex. 40, R. 327). Gross explained to Investigator Rice that the sale of these drums had actually been made but that they were returned and were later among those stolen (R. 329).

Alcohol Tax Unit Investigator Daly testified that he served the Penn-Vis Oil Company with a copy of Regulation 92 (R. 399), under which the one served is required to report to the Alcohol Tax Unit the disposition of denatured alcohol (R. 327).

Gross had filed numerous reports with the Unit pursuant to this Regulation (R. 333–335).

Neither petitioner took the stand.

ARGUMENT

The petitioners contend that the decision of the Circuit Court of Appeals holding that there was sufficient evidence to warrant their conviction as conspirators is inconsistent with its prior holding in *United States* v. *Falcone,* 109 F. (2d) 579,[11] wherein it was held that one does not become a conspirator with the distillers merely because he sells them materials, innocent in themselves, even though he knows they are to be put to an illegal use, unless he in some sense promotes the unlawful venture, makes it his own, or has a stake in its outcome. In contending that there is no proof that they participated in the conspiracy, petitioners assert, in substance, that the evidence in the instant case shows at most that they were vendors of raw materials to illicit distillers, knowing the latter to have been engaged in a conspiracy (Pet. 5–6, 11–13, 14).[12]

Although the Circuit Court of Appeals did not specifically refer to its prior decision in the

[11] Affirmed by this Court on December 9, 1940 (No. 42).

[12] While it seems to be asserted that the evidence did not go that far with respect to petitioner Gross (Pet. 4, 12), it is apparent from the summary of the evidence contained at pages 5–9, *supra*, that there is no basis for any more favorable view of the evidence as to him.

Falcone case, it is evident that it was holding in effect that the instant case was distinguishable from that case when, after reviewing the evidence, it said as to petitioner Pecoraro that the evidence "went further than to show that Pecoraro merely sold sugar to the distillers" and as to petitioner Gross that it showed that he took "an active hand in the distillers' business" and had "a stake in their venture in a sense that an indifferent seller has none" (R. 644).

The evidence summarized in the Statement fully supports the conclusion of the Circuit Court of Appeals that petitioners were not mere sellers of raw materials to the distillers but were knowing participants in the conspiracy to operate the illicit still.

Pecoraro's visits to the still premises, his active cooperation with Franzone, who worked at the still and who stated that he was working in the interest of Pecoraro and, most significantly, the fact that throughout the sixteen-day period during which Franzone worked at the still, Pecoraro was allowed to take away all of the alcohol made at the still, are wholly inconsistent, as the court below pointed out, with any view that Pecoraro "had no other connection with the enterprise than to sell sugar to the distillers" (R. 644).

There was clearly sufficient evidence to warrant the jury in finding that Gross was not an indifferent seller but an active participant in the conspiracy. The sale by him to the distillers of over

nine hundred gallons of "antifreeze," his failure to report the disposition of this denatured alcohol, in accordance with the Regulations, his attempt to recover the empty alcohol drums from the still premises after he learned of the raid by the authorities, in order, evidently, to prevent the tracing of the alcohol to him from the serial numbers of the drums, and his false report to the Alcohol Tax Unit that the alcohol had been stolen after he was unable to recapture the drums from the still premises, all lead irresistibly to the conclusion that Gross was more than an indifferent seller of materials to the distillers. His failure to report his sales of the alcohol to the Alcohol Tax Unit obviously shielded the distillers who bought it and actively assisted their unlawful venture. As the Circuit Court of Appeals pointed out, "To report the sales would have stopped the business, both the business of Gross with the distillers, and presumably any operation of the still" (R. 644). Moreover, Gross suppressed disclosure of the sales even though this subjected him to punishment for the commission of a crime (U. S. C. Supp. V, Title 26, Sec. 2811).

In the light of the evidence the Circuit Court of Appeals might well have utilized in the instant case the language which it had employed in *United States* v. *Pandolfi*, 110 F. (2d) 736, 737, certiorari denied, 310 U. S. 651, wherein it said:

> It will be seen that if this evidence proves anything, it demonstrates much more direct

> participation in the conspiracy than was shown in *United States* v. *Falcone, supra.* If the jury were to be permitted to make the deductions and inferences from this proof which would be logical and natural under the circumstances, they would necessarily conclude that these defendants took an active part in carrying the conspiracy forward, and did not limit their activities merely to the legal sale of sugar [and denatured alcohol]. We feel there is no reason why the jury should be denied the opportunity to make such logical and natural inferences.

The other decisions urged by the petitioners to be in conflict with the decision below are distinguishable factually.

CONCLUSION

The decision below was correct, there is no conflict of decisions, and the case is distinguishable from the *Falcone* case. We therefore respectfully submit that the petition for writ of certiorari should be denied.

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